IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 926 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
MER KARSHAN MULU & ORS

Appearance :
MR KC SHAH APP for Appellant,
MR ND NANAVATI for Respondents No. 1 & 2
MS SADHANA SAGAR for Respondent No. 3

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 02/07/2007, 03/07/2007 & 04/07/2007

ORAL JUDGMENT : (Per : HONOURABLE MR.JUSTICE J.R.VORA)

1 This Criminal Appeal is preferred by the State against the judgment and order delivered by learned Additional Sessions Judge, District – Junagadh at Porbandar, on 29th of April, 1986, in Sessions Case No. 30 of 1985, under Section 378 of the Criminal Procedure Code, 1973. All the three present respondents were accused in the said Sessions Case and were charged for the offences punishable under Sections 447, 341, 323, 324, 504, 302, 397, 201 to read with Section 113 and 34 of the Indian Penal Code as well as for the offences punishable under Section 25(1)(a) and Section 27 of the Indian Arms Act. The respondents were also charged for the offences punishable under Section 37(1) to read with Section 135 (1) of the Bombay Police Act. Vide judgment and order impugned in this Appeal, all the three respondents came to be acquitted by the Trial Court for all the charges levelled against them and, hence, this Appeal.

2 According to the prosecution case, the incident in question occurred on 5th of February, 1985, between 22.00 hours and 23.00 hours, in the field belonged to complainant, situated in the sim of village Bharvada. Ramde Samat - complainant and Narmad Samat - deceased in the incident, are real brothers and Samat Hamir happened

to be their father. Other two witnesses – Masari Narmad and Veja Narmad happened to be sons of deceased Narmad Samat. According to further prosecution case, this family was residing in the residence situated in their field in the sim of village Bharvada. At the time of incident, complainant Ramde Samat with his nephews Veja Narmad and Masari Narmad had been to their field for irrigating the agricultural land because they intended to sow crop of bajari. At about 10'O clock at night, Ramde Samat, Veja Narmad and Masari Narmad were doing agricultural work. At that time, three respondents accused came to their field, and out of them, accused No.1 Mer Karsan Mulu and accused No.2 Mer Balu Lakhman were identified by the witnesses, but accused No.3 was referred as unidentified person. Accused No.1 had spear with him, accused No.2 had an axe with him while accused No.3 (referred to as unknown person) had a spear with him. Accused No.1 as soon as he reached near Ramde Samat, gave a slap on his cheek. Ramde Samat asked that why a slap was delivered to him. Accused No.1 stated that he wanted Rs. 50,000/-. Ramde Samat thereupon replied that he did not have that much money with him. Thereafter, accused No.2 inflicted a blow of an axe on the waist of Ramde Samat by blunt side. Thereupon Ramde Samat had fallen down on the ground and accused Nos. 1 and 2 thereafter started dragging Ramde Samat out of field. At that juncture, accused No.3, who is

referred all the while to be unknown person, gave three blows by spear on left hand of Ramde Samat. Veja Narmad, who was present at the field, ran towards their house to call his grandfather and father and thereafter immediately Samat Hamir, Raniben, and Narmad Ramde reached at the spot. Samat Hamir requested accused No.1 to let go Ramde Samat, but accused No.1 stated that he needed Rs. 50,000/- and on delivering that amount only he would let loose Ramde Samat. On further persuasion by Samat Hamir, etc accused No.1 got excited and inflicted a blow of spear on the stomach of Narmad Samat. Narmad Samat had fallen down on the ground and blood started oozing from his wound. In the meantime, Ramde Samat got himself freed and all the three accused started running towards waste land situated near their field. While all the three accused were escaping, accused No.1 took out a revolver from his shirt and fired a round in the air. All the three accused were speaking abuses while running away. Thereafter Ramde Samat as well as Narmad Samat were seriously injured, were shifted to their house situated in the field.

3 On reaching at their house, Samat Hamir called one Jivabhai at his field and one Kana Karna was also called at his field. Thereafter Jiva Nathu and Samat Hamir both went to the village at the house of one Mulu Nathu and narrated the incident. Bhura Natha

and Mulu Nathu both came to the field of the complainant and thereafter Samat Hamir, Hamir Natha, Devshi Natha, etc also reached at the field. Injured Narmad Samat was shifted in a tractor and was taken to the government hospital, Porbandar. Injured Ramde Samat was also taken to the same hospital. Other persons including mother of the deceased accompanied them. When they reached Porbandar Government Hospital, Dr.Dilip Amrutlal Vyas, PW-6 treated them and informed Porbandar Police Station. According to the prosecution case, injured persons reached at the Government Hospital at 1.30 am. At 1.50 a.m. on 6th of February, 1985, Dr. Vyas informed Porbandar Police Station about the injured being brought to the hospital, and the then PSO of Porbandar Police Station Trikambhai Rambhai made entries in the station diary and Police Constable Jagannath Govinda – PW-23 visited the hospital and he found that Narmad Samat was in serious condition and was not in a position to speak and Ramde Samat also was not in good condition. At about 5.00 a.m., Ramde Samat was conscious and therefore he recorded the complaint offered by Ramde Samat. He went to the Police Station at Porbandar and the complaint which he produced at Exhibit-68 was registered at `Zero number' by Porbandar Police Station as the jurisdiction of the crime was of Bagavadar Police Station. At about 6.00 a.m. PSO Trikambhai Rambhai, by a special messenger, forwarded the above said First

Information Report to Bagavadar Police Station, which was received by Bagavadar Police Station at about 10.30 a.m. Investigation thereafter was entrusted to Mansukhlal Ramjibhai Jeni, PW-25, at that time, serving as PSI of Bagavadar Police Station. The crime was registered initially under Section 307 of the Indian Penal Code as Crime Register No. 15 of 1985. Thereafter, a surgery was performed on injured Narmad Samat, but he succumbed to the injuries and died at 14.15 hours in the hospital and, therefore, the offence was converted to Section 302 of the Indian Penal Code.

4 After the investigation, a charge sheet against all the three accused was submitted in the Court of Judicial Magistrate, First Class, at Porbandar. Thereafter the case was committed to the Court of Sessions, vide Order dated 05th of October, 1985. The learned Additional Sessions Judge, Porbandar, framed the above said charges against all the three accused vide Exhibit-3 on 1st of April, 1986, but vide Exhibits 4, 5 and 6 all the three accused pleaded not guilty.

5 Prosecution examined as many as 25 witnesses to prove its case and produced on record documentary evidence as well. Thereafter, further statements of each of the accused were recorded by the Trial Court on 19th of April, 1986, the defence of each of the accused was of

total denial. After hearing the prosecution and defence, the learned Trial Judge came to the above conclusion and, hence, this Appeal.

6 Learned APP Mr. K.C. Shah on behalf of the State submitted that the Trial Court committed grave error in acquitting the respondents in this serious offence. It is submitted that the Trial Court did not believe the eye witnesses only on account of they being relatives of the deceased and that their conduct was not natural. Relying upon a decision of the Apex Court in the matter of GANGADHAR BEHERA vs. STATE OF ORISSA, as reported in 2002 (8) SCC page 381, it is submitted that Law is that the evidence of close relatives may be scrutinized carefully, but it is not the law that the credibility of the witnesses is affected only on account of they being relatives of the victim. It is submitted that the learned Trial Judge also committed error in appreciating the evidence of eye witnesses. Witness Veja Narmad as well as Masari Narmad though they are minor witnesses, but they are not child witnesses and their evidence ought not to have been brushed aside by observing that they were tutored witnesses and their conduct was not natural. It is submitted that Ramde Samat is an injured witness and more weightage is required to be attached to the evidence of this witness as his injuries are also proved by Dr. Ramesh Gaurishankar Trivedi who examined injured soon after the incident.

Dr. Trivedi examined Ramdev Samat and Narmad Samat both and injuries were found fresh and there was no reason for Ramde Samat and other witnesses to implicate these three respondents in a false case and let go the real culprits. Accused No.3, even if it is found that, was known to the witnesses before test identification parade, it could not be said that this fact could make any dent in the prosecution case. It is submitted that more particularly when ocular evidence is trustworthy, there is no reason to come to a conclusion of acquittal and giving benefit of doubt to the accused. There may be minor contradictions in the evidence of eye witnesses which is quite natural as witnesses are not expected to give parrot like version, but those contradictions as have been mentioned by the learned Trial Judge in the judgment, was of no consequence. By evidence of PW-2 Dr. Ramesh Gaurishankar Trivedi it is established that the death of Narmad Samat was culpable homicide and coupled with the oral evidence, the crime of all the three respondents is amply proved by the prosecution. It must be taken into consideration that all the witnesses are rustic villagers and no exactness can be expected from these witnesses and the variation, if any, is found in their evidence, cannot be the basis of the acquittal of the respondents. All the witnesses have stated in clear terms that accused No.3 inflicted three spear blows on the hand of Samat Hamir, and a spear blow was inflicted by accused No.1 on the stomach of

Narmad Samat, resulting in his death. This say of the witnesses is corroborated by the medical experts, first, Dr. Ramesh Gaurishankar Trivedi and thereafter by Dr. Dilip Amrutlal Vyas, examined as PW-6, who first in point of time examined the injuries of both the injured persons and, therefore, in fact, there is no conflict between the ocular evidence and medical evidence. The reasons, therefore, given by the learned Trial Judge for acquitting all the respondents are untenable and the findings are not proper. It is submitted that Veja Narmad, who was witness only upto the part of the incident till Ramde Samat was dragged by the accused and he, in fact, stated so, and only because thereafter he did not return to the place of offence, it would be improper to discard his whole evidence. He appears to be a matured witness, as according to evidence, his betrothal had also taken place. His presence at the scene of offence to certain extent corroborates the prosecution case. The conduct of the witnesses, which is much criticized by the Trial Court is, in fact, a natural conduct and otherwise also it cannot be assumed that certain person would act in certain manner in given circumstances. Therefore, the reasoning of the Trial Court about the conduct of the witnesses and, therefore, discarding the prosecution case is totally erroneous. At least, it is found that the injured were immediately shifted to the hospital, where fresh injuries were found on the body of both the injured. No reasons were shown for

false involvement of the respondents in the case and, therefore, the Trial Court failed to give cogent reasons for discarding the worthy evidence of prosecution. Discovery of revolver from accused No.1 and cartridges along with the opinion of ballistic expert, certainly corroborates the prosecution case. It is clear from medical evidence that injury caused to Ramde Samat as well as Narmad Samat could have been caused by spear, also corroborates the prosecution case and, therefore, the appreciation of the evidence undertaken by the Trial Court and the reasons assigned for acquitting the accused, are wholly untenable. It is submitted that, therefore, the judgment and order is required to be set aside and since the prosecution is able to prove the case against the respondents, they be convicted and sentenced accordingly as there is ample evidence to connect them with the crime.

7 On the other side, the learned Advocate Mr. N.D. Buch on behalf of learned Senior Counsel Mr. N.D. Nanavati supported the judgment and order impugned. It is submitted that the prosecution story as disclosed by the evidence is full of material contradictions and inspire no confidence at all. It is submitted that even if the prosecution case is evaluated independently of the reasoning given by the learned Trial Judge, it becomes apparent that the prosecution case suffers serious infirmities, resulting in serious doubt in the

prosecution case. It is submitted that the prosecution firstly has failed to establish the scene of offence. It is submitted that it is found that each witness changes the scene of offence, and according to the prosecution case itself, scene of offence stated is so confusing that it could not be decided that in fact where the incident took place. The learned Advocate draw our attention towards the panchnama of scene of offence and a map drawn by the Circle Inspector, examined as witness. With reference to this, the learned Advocate also draw our attention on the evidence of witnesses in respect of scene of offence and stated that even as per the prosecution case, there are two versions as to the scene of offence, and firstly, as per the prosecution case, both the incidents occurred in the field of complainant. At the same, it is also the prosecution case in panchnama that the incident took place in the field of one Alshi Hamir. There are contradictions amongst the evidence of witnesses as complainant Ramde Samat Exhibit – 44 stated that he received injuries on left elbow while in First Information Report he stated that he received injuries on right hand. The medical certificate produced on record denotes that the complainant had injuries on right hand. Very important aspect, according to learned Advocate, is in respect of the first injury, which the complainant received on his waist. It is the prosecution case that with the blunt part of an axe, accused No.2 inflicted him that injury, but during medical examination,

soon after the incident, no such injury was found by Doctor and even though Ramde Samat was admitted in the hospital for about 7 days he did not take any treatment in this respect. The complainant alleges about his dragging by accused Nos. 1 and 2 for about 10 to 12 feet, but even then, as admitted by the complainant, he did not receive any bruises on his back. The story, therefore, narrated by the prosecution witnesses is improbable and impossible. The presence of prosecution witness Masari Narmad is also doubtful at the scene of offence. Contradictions brought about in his cross-examination in respect of the incident, is proved through the evidence of Investigating Officer. Learned Advocate drawn the attention of this Court towards these contradictions recorded in the evidence. His evidence also creates confusion as to when axe blow was inflicted i.e. before Veja Narmad left the scene of offence or after that. Our attention was also drawn to the evidence of Veja Narmad as well as on the evidence of Samat Hamir. The prosecution case becomes doubtful as to when the spear blows were given to witness Ramde Samat. The evidence of Veja Narmad shows that he had left the scene of offence even before the spear blows were given to the complainant. The complainant states that spear blows were given by accused No.2 before Samat Hamir reached at the scene of offence while Samat Hamir states that those three spear blows had given by accused No.2 in his presence. Even

drawing our attention to the deposition of Samat Hamir, in cross examination, the truth was elicited from this witness, as submitted by learned Advocate. It is submitted that Samat Hamir attempted to have stated that some unknown persons had beaten Ramde Samat and Narmad Samat. Samat Hamir was present when the panchnama of scene of offence was drawn and he stated the scene of offence which is somewhere else than in the field of witnesses. While all through out the witnesses gave an impression that both the incidents took place within the field of the complainant and witnesses. It is, therefore, submitted that this confusion and infirmities created in the prosecution case are fatal and it is difficult to reach conclusion of guilt from this evidence. It is submitted that the medical evidence was also fall short to bring home the guilt of the accused because more particularly it could not be established by the prosecution case that the blow which was given to Narmad Samat was possible by a spear, because in such a case, both the edges of the wound would be clean cut, as the spear is two edges sharpened weapon, but this fact has not been examined by Dr. Dilip Amrutlal Vyas. The recovery or discovery of weapon i.e. revolver and a knife from the accused is of no consequence because neither revolver nor knife, according to prosecution case, were used in the incident. It is improbable that accused No.1 would fire a round from his revolver while escaping from the field of the witnesses. At the same

time, it is improbable that accused No.2 would have handled two weapons at a time i.e. an axe and knife both. On the contrary, the prosecution case becomes improbable by referring to revolver and knife. The learned Trial Judge has given cogent reasons for acquitting the accused. The appreciation of the evidence was undertaken by the Trial Court of the evidence recorded during trial, and no extraneous material was taken into consideration. It is submitted that unless it is established that reasons given by the Trial Court are perverse, the same would not be interfered with in acquittal appeal. It is submitted that leaving aside the natural conduct of the witnesses, criticized by the Trial Court, if rest of the case of the prosecution is examined, the witnesses do not inspire any confidence and prosecution case is not proved beyond reasonable doubt. It is submitted that, therefore, no interference is required in the judgment and order impugned in this Appeal. It is, therefore, requested that the appeal be dismissed.

8 The learned Advocate Ms. Sadhana Sagar appears for respondent No.3 and adopted the arguments advanced by learned Advocate Mr. N.D. Buch for respondents No. 1 and 2 and submitted that no interference is required in the impugned judgment and order.

9 This is an Appeal against the acquittal. The law laid down

in dealing with the acquittal Appeals is clear and well established. The High Court has the same powers in dealing with the orders of acquittal as it has in dealing with the orders of convicting the accused. High Court may re-appreciate the evidence recorded during the trial and come to its own conclusion, but it must be noted that when two views are possible from the same evidence, view favourable to the accused must be adopted, and unless the reasoning given by the Trial Court for the acquittal are perverse and wholly untenable and against the weightage of the evidence, interference is not warranted in the order of acquittal. In the matter of AJIT SAVANT MAJAGAVI vs. STATE OF KARNATAKA, as reported in (1997) 7 SCC, 110, the Apex Court while dealing with the appeal against acquittal, settled the following principles in para 16 of the decision which is as under :

"16. This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the Trial Court. These principles have been set out in innumerable cases and may be reiterated as under :

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the

powers, it possesses while hearing an appeal against the order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record,or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal

of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the court especially in the witness box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

10 Therefore, we have undertaken a complete and comprehensive appreciation of all vital features of the prosecution case and the entire evidence on record has been appreciated with reference to the broad and reasonable probabilities of the case. The contention raised by both the sides have also been taken into consideration. We have re-appreciated and scrutinized each corner of the case to come to our independent conclusion. We have also evaluated the reasons given by the Trial Court for the order of acquittal.

11 It is, therefore, necessary to depict the gists of the evidence recorded at the trial and for appreciating the same. The prosecution examined following witnesses :

11.1 PW-1 Laldas Ramandas is examined at Exhibit – 34. This witness was Circle Inspector and had visited the scene of offence on 20th of November, 1985 in pursuance of Yadi of Bagavadar Police Station. He prepared a map of scene of offence, which he placed at Exhibit – 35. He had received a copy of panchnama of scene of offence. He stated that, according to the panchnama of scene of offence, he prepared the Map at Exhibit-35.

11.2 PW-2 Dr. Ramesh Gaurishankar Trivedi is examined at Exhibit – 36. On 6th of February, 1985 at 4.50 p.m. he received inquest report and dead body of Narmad Samat. He performed postmortem on dead body. According to him, the deceased had surgical wound. The deceased had corresponding internal injuries as described in Column – 21 of Postmortem Note which he produced at Exhibit-23. According to him, cause of death was due to haemorrhage as a result of injury received over abdomen. In his cross-examination, he stated that there were two injuries on the dead body, one of them was stitched wound

and with certainty he could not say that such injuries could be caused by which weapon. He stated that he could not say with certainty whether bleeding was on account of wound or post surgical.

11.3 PW-3 Bhima Ruda is examined at Exhibit-37. He is panch witness of identification parade panchnama. According to him, he was called by the Executive Magistrate at his office. The second panch was Lala Vashrambhai. He supported the panchnama and stated that amongst the line of persons, witnesses identified accused No.3. The panchnama of Identification Parade is produced at Exhibit-38.

11.4 PW-4 Mulshankar Harilal Upadhyay is examined at Exhibit-39 and according to him he was the Executive Magistrate at Porbandar on 15th of February, 1985 and in pursuance of a Yadi from Bagavadar Police Station, on 14th of February, 1985, he arranged TI Parade of accused No.3 on 15th of February, 1985 in the presence of panchas. It is noteworthy that while accused No.3 was asked to take his place of choice amongst the line of other persons and to change the clothes, if he so desired. The accused No.3 stated that the witnesses knew him as witnesses happened to be his neighbours. Thereafter, this witness narrated the procedure of TI Parade wherein all the five witnesses identified accused No. 3 one by one amongst the line of other persons.

11.5 PW-5 Gandalal Vasram Duchatra examined at Exhibit-40 is second panch of panchnama at Exhibit-38 and he also supported the panchnama.

11.6 PW-6 Dr. Dilip Amrutlal Vyas examined at Exhibit – 41 stated that on 6th of February, 1985, he was serving as Medical Officer at Bhavsinhji Hospital, Porbandar. At 1.50 hours, Ramde Samat, aged 25 and Narmad Samat, aged 32, were brought before him for treatment without police yadi. Ramde Samat had following four injuries :

(i) Incised wound of 2" x 1" x muscle deep vertical anterior-medial part of upper 1/3 of (Rt) forearm.

(ii) Incised wound of 1" x 1/2" muscle deep vertical over anterior aspect of upper part of (Rt) fore arm.

(iii) Incised wound of 1 1/4" x 1" muscle deep vertical over lateral aspect of upper 1/3 of (Rt) forearm.

(iv) Incised wound of 1" x 1/4" x skin deep oblique over posterior aspect of (Rt) arm.

According to this Doctor, injuries to Ramde Samat could have been caused by sharp cutting weapon and could be healed within 8 to 10 days, if no complication arose. The patient was discharged on 11th of February, 1985. According to Doctor, injuries were fresh and he produced on record the injury certificate in respect of Ramde Samat at Exhibit – 24. In respect of Narmad Samat, he stated that the patient had

incised wound by 2" x 1" cavity deep oblique over (left) hypo-centric region. Intestine outside the abdominal cavity. He further stated that the patient was conscious when he was brought to him and patient had died at 2.50 p.m. on 6th of February, 1985 after an operation was performed upon him. Before operation, his condition was serious. The injuries were fresh and could have been caused with sharp cutting weapon like muddamal Article No. 17 spear. He produced on record the case papers which he produced at Exhibit-42. According to him, the operation of this patient was performed by Dr. Gohil. He further stated that from the case papers of Dr. Gohil, he could say that the injuries to this patient were serious and likely to cause death. In his cross-examination, he stated that he had not seen internal injuries. In case papers, the findings were given after operation. He admitted that muddamal Article No. 17 spear was sharp on both sides. He admitted that if any injury is caused by muddamal Article No. 17, the injury would be clean cut by both the edges, but he did not note in his case papers about edges of the injuries. He also admitted that if any straight injury is caused, then it would be piercing wound.

11.7 PW-7 Jayantilal Bhavanishankar Vyas is examined at Exhibit – 43. According to him, in February 1985 he was serving in Junagadh Jail as Jail Superintendent. At that time accused No.3 was

undergoing the sentence awarded to him in Sessions Case No. 65 of 1983 and his Number was 20448. He was released on parole from the jail on 24.10.1985 and he was required to resume jail on 01st of November, 1984, but he did not turn up and ultimately he was apprehended by police.

It appears that this witness is examined by the prosecution to prove previous conviction of accused No.3.

Date: 03.07.2007

11.8 PW-8 Ramde Samat is examined at Exhibit – 44. He is complainant and injured witness. According to him, at the time of the incident, he with Veja and Masari, were irrigating land because bajari was to be sown. While all the three were irrigating the land, three accused came there in their field. He identified accused Nos. 1 and 2 while accused No.3 was described as “unknown person”. He stated that accused No.1 and 3 had spears with them while accused No.2 had an axe with him. As soon as they reached near him, accused No.1 delivered a slap to this witness and stated that he wanted Rs. 50,000/-. Ramde Samat replied that he did not have that much amount with him. Thereafter accused No.2 inflicted a blow of blunt part of an axe on

waist of Ramde Samat. Ramde Samat had fallen down on the ground and accused Nos. 1 and 2 started dragging him. At that juncture, accused No.3 inflicted three blows with spear on left hand of Ramde Samat. His nephew Veja went towards their house to call his father, brother and mother and all the three came at the spot. Samat Hamir, father of Ramde, according to this witness, requested accused No.1 to let go Ramde Samat, but accused No.1 stated that he wanted Rs. 50,000/- and on that payment only, he would let go Ramde Samat. In this process, accused No. 1 got excited and inflicted a blow on stomach of Narmad and on account of this, Narmad had fallen down on the ground and blood started oozing from his wound. This witness stated that he freed himself and thereafter all the three accused started running towards waste land. At that time, accused No.1 took out a revolver from his shirt pocket and fired a round and gave abuses to them. Witness stated that he and Narmad were shifted by their father and mother to their house and thereafter were taken to hospital at Porbandar. Witness stated that in hospital, his complaint was recorded by a Police Jamadar of Porbandar Police Station. He identified the complaint and identified muddamal articles spear and axe. He identified revolver as well. In his cross-examination along with his other statements, he admitted that before giving a complaint, he came to know that the third accused was Mer Dilip @ Lakhman and belonged to

Bharvada village and his house was situated near the house of the complainant. He further admitted that he knew accused N.3 since long and accused No.3 had been convicted in a murder trial. He further stated that while he was irrigating the land, he was in his field and on southern side, field of Alshi Hamir was situated and thereafter the field of Samat Hamir was situated and thereafter waste land was situated from where the accused came and went away. He admitted that there was swelling on his waist on account of blow of accused, but he did not take any treatment in this regard though he was in hospital for 5 to 7 days. He further stated that the place where he was watering his field was situated at about 100 to 150 feet from their houses. When his father came at the scene of offence from southern limits of his field, he was in northern portion of his field. In his cross-examination, in para-9, he admitted that, he stated before the police that his brother Narmad attempted to rescue him, and at that time, accused No.1 ran towards Narmad and inflicted piercing wound by spear, and at that time, he got freed and unknown person inflicted three blows of spear on his left hand. He also admitted that Bagavadar Town where the police station is situated was 1 ½ Kms away from his field. He also stated in his cross-examination that he came to know the fact after 7 to 8 days of the incident that his father had seized an axe from accused No.2. Again he stated that when accused

No.1 fired a round from his revolver, he was four to five feet away from him where he was standing in his field.

11.9 PW-9 Masari Narmad is examined at Exhibit – 45 and at that juncture he was aged 11 years and, therefore, the learned Trial Judge ascertained whether he understood the sanctity of truth and thereafter oath was administered to him. He stated that on day of incident, his father Narmad had been to village Bharvada for hiring labourers for the agricultural work and he with his brother Veja and his uncle Ramde in their field and were watering the land for sowing bajari crop. At that time, at about 10 to 11 at night three accused came there. Accused Nos. 1 and 3 had spears with them. Again accused No.3 has been described to be unknown person by this witness. He further stated that accused No.2 had an axe with him. Accused No.1 delivered a slap to his uncle Ramde and when his uncle inquired that why he was beaten, accused No.1 stated that he wanted Rs. 50,000/-. His uncle Ramde stated that he did not have that much amount with him and, therefore, accused No.2 gave a blow by an axe on waist of his uncle. His uncle had fallen down on the ground and his brother Veja ran towards their house to call other relatives. The witness stated that he also attempted to reach at their house, but accused No.1 threatened that had he moved from the place, he would be fired with revolver.

Thereafter, accused Nos. 1 and 2 started to drag his uncle towards waste land. In the meantime, his father Narmad and grandfather Samat and grandmother came at the spot, and his father requested accused No.1 to let go Ramde. Accused No.1 stated that he wanted Rs. 50,000/- and he would let go Ramde only if he is paid Rs. 50,000/-. In this process, accused No.1 got excited and inflicted a spear blow on the stomach of his father Narmad and his father had fallen down on the ground. Thereafter an unknown person (accused No.3) inflicted three blows of spear on his uncle. The accused were giving abuses and accused No.1 fired a round from his revolver in the air. The wound inflicted on his father was bleeding. He stated that he was called in the TI Parade in which he identified accused No.3. In cross-examination he had been asked about the incident. Thereafter, he also stated that the unknown person (accused No.3) belonged to village Bharvada, but he could not remember whether the house of accused No.3 was situated at the distance of 50 to 60 feet from their residential house in village Bharvada. He stated that at the time of incident occurred they were near the heap of groundnut in the field. He was standing near the heap and Veja was standing at the distance of about 10 feet. His uncle was away from that heap at the distance of 5 to 7 feet. He has been asked about how he identified the accused and what was his reaction on first seeing the accused. He, however, stated in his cross-examination that

on the day of the incident and before the incident, accused No.1 alone had been to their field, but he could not say when he had come, but he was sure that he had been to the field in day time. He stated that when the accused No.2 inflicted blows with an axe, his brother Veja had run away from that spot. In para-8, the contradictions were asked about the incident. He stated that in his statement before the police, he did not say that unknown person inflicted three blows of spear on his uncle Ramde. He also did not state before the police that accused No.1 fired a round from his revolver. In fact, he denied not to have stated this fact before the police. He further denied not to have stated before the police that he noticed that his father Narmad and his uncle Ramde had got injuries when they were shifted to their house.

11.10 PW-10 Veja Narmad is examined at Exhibit – 46. He is also an eye witness to the incident. He was aged 13 years at the time of deposition and, therefore, the Trial Court ascertained his discretion and administered the oath. He also stated that he, his brother and his uncle Ramde were watering the field at about 10.00 to 11.00 P.M. on the day of the incident and three accused came from waste land. Accused No.1 and accused No.3 (described as unknown person) had spears with them. Accused No.2 had an axe with him. Accused No.1 stated that he wanted Rs. 50,000/- from his uncle Ramde and his uncle

replied that he did not have that much amount. Thereafter accused No.2 inflicted one blow by blunt part of an axe on waist of his uncle Ramde. His uncle Ramde had fallen down on the ground and thereafter he was dragged towards waste land. At that juncture, he ran towards his house to call his father, grandfather and grandmother. He identified the accused in the court and stated that after the incident he attended TI parade and identified accused No.3. In his cross-examination, he stated that, at the time of incident, they were in their field and were away about 10 feet from the heap of ground nut. Their house was situated at about 150 feet from the said heap. The accused could not be recognized till they came at the distance of 4 to 5 feet from them. He has been asked about the situation after the incident. He further stated that he witnessed the incident while he was on the northern side of the heap of groundnut. In para-8 of his cross-examination, he admitted that accused No.3 belonged to their village and his name was Dilip Lakhman. He stated that he could not say whether the house of the accused No.3 was situated at the distance of 50 to 60 feet from their house at village Bharvada.

11.11 PW-11 Samat Hamir is examined at Exhibit -47. He happened to be the father of injured Ramde and deceased Narmad. According to him, after offering evening prayer while they were

preparing for their supper, elder son of Narmad came to him running and stated that accused Nos.1 and 2 and one unknown person were beating his uncle Ramde and they were dragging him. Therefore, he along with his son Narmad, went to the spot where Ramde was being dragged by the accused. When they reached at the scene of offence, he noticed that accused No.1 had caught hold of Ramde on his neck. He inquired from accused No.1 that why Ramde was caught hold of, and accused No.2 stated that he wanted Rs. 50,000/-. He requested accused No.1 to let go Ramde, but accused No.1 insisted that Ramde would not be released unless he is paid the amount. In the meantime, accused No.1 got excited and inflicted one blow of spear on the stomach of his son Narmad. Narmad had fallen down on the ground. Ramde was released in this process and unknown person (accused No.3) inflicted three blows of spear on the hand of Ramde. He had snatched an axe from the hand of accused No.2. Accused No.1 had revolver with him. He thereafter shifted both the injured to his house and stated to his wife to call Jivabhai and other persons. He stated that when he reached at the scene of offence, he was wearing chorani and cap while Ramde was wearing shirt, cap and scarf. He stated that when he reached at the scene of offence his cap had fallen down on the ground. He stated that he was called in TI parade and he had identified accused No.3. In his cross-examination, along with other facts, he stated that he did not send

anybody to Bagavadar Police Station for declaration of this incident. He stated that on the next day, at about 11.00 a.m., Bagavadar Police had been to their field, had drawn the panchnama of scene of offence and he had shown the place of offence. He had found his cap in the field of Alshi Hamir. One sheath of knife was also found from the field of Alshi Hamir. Near the heap of ground nut in his field, a scarf and a cap of his son Ramde were found lying. The place at which cap of his son was found lying and the place at which his cap was lying along with sheath of a knife were at the distance of about 150 feet. He stated that on the next day, an axe was seized by the police from him and at night he had kept this axe in the compound of his house. He stated that when police seized the said axe which had stains of blood. He admitted that accused No.3 Dilip Lakhman belonged to his village and his residential house in village Bharvada was situated nearby the residential house belonged to him. He stated that he knew accused No.3 and his brother long before the occurrence of the incident. In para-10 he stated that after the incident while he describing the incident before Jivabhai and Karan stated that some unknown persons had assaulted his sons in the field. Thereafter the defence had cross-examined this witness about the enmity on account of betrothal of the niece of accused No. 1.

11.12 PW-12 Deva Atia, examined at Exhibit – 48, and PW-13 Rama Masari, examined at Exhibit-49, both were panchas of panchnama of the scene of offence - Exhibit – 50, but none of these witnesses supported the prosecution case.

11.13 PW-14 Bhima Jiva, examined at Exhibit – 50, is panch of panchnama of Exhibit – 52 whereby the prosecution case is that on 6th of February, 1985, panchnama at Exhibit-53 was drawn and chappals seized from the scene of offence were identified to be the chappals of accused No.3 by wife of accused No.3. This witness stated that police informed him that those chappals belonged to accused No.3 and except that he did not know anything.

11.14 PW-15 Govind Mulji is examined at Exhibit – 53 is panch of panchnama at Exhibit-54, by which according to the prosecution case, accused No.1 was arrested and he produced one spear. This panchnama was drawn on 11th of February, 1985. The witness Govind Mulji did not support the prosecution case and the panchnama.

11.15 PW-16 Jetha Samat, examined at Exhibit – 54, is second panch of the panchnama at Exhibit-54 and he has also not supported the prosecution case.

11.16 PW-17 Rambhai Jethabhai, examined at Exhibit – 56, is panch of panchnama at Exhibit – 58, by which it is alleged that accused No.1 discovered revolver used at the time of the incident, but this panch has not supported the prosecution case. It is alleged that upon information received by the accused, police and panch went to village Bharvada and near one house, out of one heap of garbage, accused No.1 took out a revolver.

11.17 PW-18 Kara Viram is examined at Exhibit – 57, is the second panch of panchnama at Exhibit-58. He supported the prosecution case to some extent, but in his cross-examination, it is revealed that, his hotel was situated Opposite Police Station and whenever policed needed, he was called as panch and he was panch in many panchnamas earlier also.

11.18 PW-19 Kala Viram, examined at Exhibit-59 is panch of panchnama at Exhibit - 60 and by panchnama at Exhibit -60 it is alleged that on information received by accused No.2, he led police and panchas near cremation ground of village Bharvada and took out a knife from below one stone. Though the panch supported the prosecution case, but it appears that the place from which the knife was recovered

is a open place. He also admitted that whenever the police called him for panchnama, he used to go.

11.19 PW-20 Devsi Malde, examined at Exhibit – 61 is also a panch of panchnama at Exhibit-62. It is alleged that in the presence of panchas, chappals recovered from the scene of offence had worn by the accused and the said chappals fitted in his feet. This panch did not support the prosecution case.

11.20 PW-21 Kara Karsan, examined at Exhibit 63, is also a panchnama at Exhibit - 64 and it is alleged that on information received from accused No.3, a spear used in the incident was discovered from village Khristi. The panch has supported the prosecution case, but admitted that he was panch in many panchnamas earlier at the instance of the police.

11.21 PW-22 Trikambhai Rambhai, examined at Exhibit – 65, was the then PSO of Porbandar City Police Station. He stated that on 6th of February, 1985, at about 1.50 a.m. one Girishbhai, on behalf of Dr. Vyas, informed him telephonically that Narmad and Ramde Samat had been injured by somebody in a scuffle and they were admitted to

hospital. The witness stated that he deputed Head Constable Jagannath Govinda directing him by a Yadi to inquire into the matter and he noted the information in the Station Diary, which he produced at Exhibit-90. Thereafter, at 6.00 A.M. Jagannath Govinda presented before him a complaint given by Ramde Samat and he forwarded that complaint to Bagavadar Police Station after recording the same at `0' Number as the incident had occurred in the jurisdiction of Bagavadar Police Station. He has been cross-examined by the defence.

11.21 PW-23 Jagannath Govinda is examined at Exhibit-67. According to this witness, he received Exhibit - 66 yadi from PSO of Porbandar City Police Station to inquire into the matter and he visited Bhavsinhji Hospital. He went to injured Narmad and Ramde and found that Narmad had received injury of spear in his stomach and Ramde had three injuries of spear on his right hand. Narmad was admitted to the emergency ward while Ramde was admitted to first floor. General condition of Narmad Samat was not good and he was not able to speak. Thereafter he visited Ramde Samat and at that time he was being treated and was not in a position to speak before the police. Thereafter Narmad Samat was shifted to the operation theater and his operation continued till 5.30 p.m. At about 5.00 to 6.00 a.m. he recorded the complaint of Ramde Samat when he gained

consciousness. He identified the complaint produced at Exhibit – 68. He presented the complaint before the PSO, Porbandar City Police Station. On 6th of February, 1985 Narmad Samat died and he draw inquest panchnama as directed by PSO, Porbandar Police Station. PSO of Porbandar Police Station thereafter forwarded the inquest panchnama papers to Bagavadar Police Station. In his cross-examination, he admitted that in Exhibit – 66 he did not note the time and date. He further stated that Ramde was not fully conscious and one person of Bharvada village was with him. He stated that Ramde was able to speak but he was not able to speak properly. He further stated that he did not obtain any opinion as to the general condition of Narmad Samat, but he orally talked to the Doctor about Ramde Samat and Doctor had told that at that juncture Ramde was not able to speak, but he would be able to speak after some time. Thereafter he wrote a Yadi to the Executive Magistrate for recording of Dying Declaration of Narmad Samat. He recorded the complaint at 4.45 a.m. and about 5.45 he got out of the hospital. He did not know whether the Executive Magistrate had recorded any statement of Ramde Samat.

11.22 PW-24 Bhojabhai Bhimabhai Parmar, examined at Exhibit – 70, was the then PSO of City Police Station, Porbandar. He had made entires in the Station Diary vide Entry No.25 regarding the intimation

received from Dr. Vyas about the death of Narmad Samat, which he produced at Exhibit – 19, and identified his writings and signature.

11.23 PW-25 Mansukhlal Ramjibhai Jeni, examined at Exhibit – 71, was at the relevant juncture PSI of Bagavadar Police Station and according to him he received a F.I.R. at 10. 30 a.m. as forwarded by Porbandar Police Station, on 6th of February, 1985. He registered the offence and took the charge of investigation. He visited the scene of offence and in the presence of witness Samat Hamir, draw the panchnama of scene of offence and seized the blood stained earth, axe etc. He recorded the statement of witnesses and came to know that accused No.3 which was referred to as unknown person was Dilip Lakhman and, therefore, he ascertained that the chappals found from the scene of offence belonged to accused No.3. Accused were arrested by him and on death of Narmad Samat , a crime was registered under Section 302 of the Indian Penal Code. He continued with the investigation day-by-day, draw discovery panchnamas and filed charge sheet. He sent the muddamal articles to the Forensic Science Laboratory for analysis. He has been cross-examined by the defence in detail.

12 This is the gist of the evidence of the prosecution.

13 The learned Trial Judge came to the conclusion that the conduct of the witnesses were unnatural and improbable as not to place any reliance on any of the witnesses. The learned Trial Judge observed that minor witness Veja Namad attempted to be an eye witness of the incident, and that fact itself cause doubt upon prosecution case. The learned Judge also observed that the medical evidence was not in corroboration of the prosecution case as Narmad admittedly received injuries by spear, but the wound of Narmad was not properly described by the medical expert, as wound must have both edges clean cut. The learned Judge observed that the story of the prosecution was improbable because if Ramde was dragged by the accused, there might be injuries on his back or some indication on his clothes, but nothing came forward. The complaint i.e. FIR was offered late without any explanation from prosecution. The learned Trial Judge observed that, it appears that, it was a well thought complaint. Referring to the contradictions amongst the evidence, the learned Trial Judge came to the conclusion that those contradictions were going to the root of the prosecution case and destroyed the story of the prosecution. The learned Trial Judge observed that since the witnesses were relatives of the deceased, their evidences was examined very carefully and it was found that no reliance can be placed on their testimony. The learned

Trial Judge further observed that the evidence of witnesses was not discarded only because they were relatives, but on careful scrutiny, their behaviour, at the time of incident and thereafter, was not found natural and on account of contradictions in the prosecution case, they were not believable.

14 As aforesaid, we have re-appreciated the evidence dispassionately and independently to assess the prosecution case. It is not the conduct or behaviour of the witnesses only which would destroy the prosecution case, but the prosecution case has to be judged from all angles. It is the duty of the court to separate the grain from the chaff and where it is not feasible to separate truth from falsehood because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution, completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. The witnesses may depose consistently on vital aspect of the prosecution case, but it becomes the duty of the court while appreciating the evidence to evaluate the intrinsic worth of the say of the witnesses and to find out the truth. Mere consistent say of the witnesses is not sure guarantee of truth, but the prosecution case has to be judged from

various angles like probability, natural course of events, enmity between the parties, creditworthiness of the witnesses, etc and in this process integrated prosecution case has to be evaluated. If any flaw or infirmity is noticed in the prosecution case, going to the root of the incident, which might have been canvassed by the prosecution, the accused is entitled to reasonable benefit of doubt. On the other hand, if the prosecution witnesses are credit worthy, contradictions here and there, are insignificant, the prosecution case is said to have been established. As aforesaid, it depends upon various factors and the facts of each case for which no straight jacket formula can be formulated. While re-appreciating the evidence in this case, we have noticed following infirmities, serious in nature, which destroys the prosecution case and reasonable benefit of doubt, according to our humble view, must be resolved in the favour of the accused.

15 Very important aspect of the prosecution case in criminal trial is the scene of offence. Prosecution must determine and come with a clean case as to the scene of offence in each criminal trial to avoid confusion because ultimately this fact leads to the credibility of the witnesses. In the present case, panchnama of scene of offence is produced at Exhibit – 50 and from the said panchnama of scene of offence, a map is prepared by PW-!, Laldas Ramandas, examined at

Exhibit – 34. Map is produced at Exhibit-35. Though both the panchas have not supported the panchnama of scene of offence, but we found some support from the evidence of Samat Hamir, PW-11 because he had shown the scene of offence to the Investigating Officer on the next day of the incident. Now, according to prosecution case, first incident which Exhibit – 50 panchnama describes occurred in the field of one Alshi Hamir, from where the chappals of accused No.3, a sheath of knife, a cap and scarf were found. This field is situated on the eastern side of field referred to by the witnesses in the evidence. One field of Samat Hamir is shown in the map on the southern portion of the field of Alshi Hamir. Now it is a statement of Samat Hamir that scuffle between Ramde and accused took place in the field of Alshi Hamir, where his cap had fallen down. In the next para, on the southern portion of the above place, the scene of offence where Narmad was injured, is shown by Samat Hamir, which is 135 feet away from the scene of offence of first incident, but according to this panchnama and the map, this scene of offence is also on a cart way between the field of Samat Hamir and Kehsav Karna shown in the map by red circle. Now both the places of both the incidents, according to panchnama - Exhibit – 50 and statement of Samat Hamir made in the said panchnama and as per the map placed at Exhibit – 35, are not situated within the precincts of field of Samat Hamir. When we

evaluated the evidence of witnesses, a clear impression is given by them that both the incidents occurred within the precincts of the field of Samat Hamir, somewhere near the heap of ground nut, where Ramde Samat and his two nephews were watering their field. Ramde Samat stated in cross-examination that where he was working in his field on southern side - field of Alshi Hamir was situated. He categorically stated that while he was in his field, the accused came in their field from the way going towards village Vijrana. Further he stated in his deposition that their house was situated about 200 feet away from the place where he was watering the land. He deposed to the extent that when his father came before the second incident, he was well within the precincts of his field, and that too, in northern portion from southern limits of the field. While PW-9 Masari Narmad stated in his deposition in para-8 that while they were working in their field, he was standing near the heap of groundnut and his brother Veja Narmad was standing about 10 feet away from him. At that juncture, the accused came to their field. While witness Veja Narmad also stated in his deposition that all the three accused came in their field when first incident occurred. In cross-examination in para-5 Veja Narmad stated that accused were coming from southern side in their field and towards northern portion of the field where they were working near the heap of groundnut. Witness Samat Hamir stated that when he reached at the

scene of offence, his cap had fallen down right at the scene of offence. In para-6 of his deposition he stated that his cap had fallen down in the field of his brother Alshi Hamir when he had shown the scene of offence to the police. He further stated that scarf and a cap of his son Ramde were found near the heap of ground nut. According to him, the distance between these two places was about 200 feet. Thus, according to the prosecution case, the first set of evidence in panchnama and in map, as aforesaid, scene of offence was disclosed in the field of one Alshi Hamir and second scene of offence in the cart way, while all the witnesses stated different scene of offence for both the incidents, but consistently they deposed that the incident occurred within the precincts of their field. This serious infirmities in prosecution case affects the credibility of witnesses. This infirmity goes to suggest that the witnesses conceal genesis of the incident. The prosecution case is weakened by creating confusion about the scene of offence which could not be proved properly and leads to confusion. The question which arose is what would be the reason for Samat Hamir to show the scene of offence outside his field i.e. first incident in the field of Alshi Hamir and the second incident in a cart way, and what could be the reasons for the witnesses to state that both the incidents took place within their precincts of their field. This leads to a conclusion that the incident has occurred somewhere else and not in the manner as stated by the

witnesses and, therefore, though the injured witness has been examined, his injuries are also proved by the medical evidence, the evidence of the witnesses is not worthy of credit on account of confusion and falsity.

16 The medical evidence led by the prosecution also creates some doubt in the prosecution case. Admittedly, deceased Narmad received injuries by a spear blow straightway. When we assessed the evidence of Dr. Dilip Amrutlal Vyas, PW -6, we found that, according to this witness, deceased Narmad, when examined by this witness, had one incised wound as described by him in the case papers at Exhibit - 42. Spear is double edged weapon and when a straightway injury is inflicted by spear, then both the edges of the wound would be clean cut, but this witness failed to notice this aspect, and he admitted in his examination-in-cross that to prove that the wound was inflicted by weapon like spear, it was necessary to examine the wound thoroughly. Undoubtedly, as per the say of the witness, Narmad received a penetrated incised wound. Great care should be taken in probing the penetrated wound. If necessary, a blunt probe or catheter should be used. The direction of the wound may give a clue as to whether it was a suicidal, homicidal or accidental. The position of the victim and his attacker may also be inferred. However, in the

case papers at Exhibit – 42, the wound is described as an incised wound and size is mentioned. The doubt is created therefore that whether such wound was inflicted by a spear as stated by the witnesses, and particularly when the statements of the witnesses is found not credit worthy, the medical evidence becomes significant. In the present case, this wound could not be examined by the Doctor, who conducted the postmortem and examined by the prosecution Dr. Ramesh Gaurishankar Trivedi as PW-2. He only found that there was a stitched wound and one more surgical wound. When ocular evidence is not clear, medical evidence assumes importance. This is also serious infirmities in the prosecution case.

17 When prosecution case is examined as a whole, we found one more serious infirmity in the prosecution case in respect of accused No. 3 Dilip Lakhman. As we have observed earlier that mere consistent statements of the witnesses is not sure guarantee of the truth and the statement of the witnesses are required to be examined on the anvil of probability and truthfulness. Now accused No.3 Dilip Lakhman right from the beginning of both the incidents has been described by the witnesses, as an unknown person along with accused Nos. 1 and 2. To the extent that a test identification parade was held at the instance of the Investigating Officer by the Executive Magistrate, PW-4 Mulshankar

Harilal Upadhyay, who conducted said parade on 15th of February, 1986. A panchnama in this respect is produced at Exhibit-38. In the said panchnama, according to the evidence of Executive Magistrate, witnesses Samat Hamir, Ramde Samat, Raniben (not examined by the prosecution) Veja Narmad and Masari Narmad identified accused No.3 in the said test identification parade. However, when we scrutinized the prosecution case as a whole, we found that the witnesses categorically stated that they knew accused No. 3 Dilip Lakhman even before the incident and that too for long time. This is so because accused No.3 belonged to their caste and was a resident of the same village i.e. Bharvada. Not only that, witnesses stated that the residential house of accused No.3 was situated nearby the residential house of the witnesses at village Bharvada. Even witness Samat Hamir goes to say that he knew accused No.3 long before the incident. This is also stated by complainant Ramde Samat. It would be difficult to believe that the rest of the two eye witnesses i.e. Veja and Masari did not know accused No.3 and the confusion which emerges from this situation is that why accused No.3 was described to be a unknown person when he was well known to the witnesses. Not only that, but the prosecution case goes to the extent that a test identification parade was also held for an accused who was known to the witnesses long before the incident. No explanation in this respect is coming forward from the prosecution case

that why then the prosecution witnesses described accused No.3 to be unknown person during the incident when they could recognize accused Nos. 1 and 2 by name and face, it was not difficult for them to recognize accused No.3 as well when he was known to them long back before. It is not the prosecution case that accused No.3 could not be identified at the time of incident for whatever reasons and could be identified thereafter. Thus the attempt by the witnesses to describe accused No.3 to be an unknown person even though he was known to the witnesses long before the incident, leads to the only conclusion that the witnesses again conceal the genesis of the incident and manner in which it occurred. This aspect destroys the creditworthiness of the witnesses even if they consistently say that accused No.1 inflicted an injury on the stomach of deceased Narmad and accused No.3 inflicted spear injuries on the hand of injured Ramde Samat. The manner in which the incident might have occurred is for the reason best known to the witnesses is not truthfully narrated before the Investigating Officer nor before the Court by the witnesses. Inference could be drawn that the incident has not been occurred as per the say of the witnesses even though there were injuries on bodies of Narmad and Ramde both, for which there was medical evidence available. These are the circumstances which casts doubt on consistent statements of the witnesses about the injury caused by the accused to the injured

witnesses, out of which one succumbed to the injures. Going through the prosecution case from various angles, we do not find any other reason that why the prosecution witnesses attempted to conceal the fact that they knew accused No.3 long before the incident and described him to be an unknown person. This doubt created by confusion in the prosecution case must be resolved in the favour of the accused.

18 The next circumstance which shakes the credibility of the prosecution witnesses and makes serious dents in the prosecution case is a fact of presenting an axe by Samat Hamir to the Investigating Officer on the next day of the incident. Irrespective of the improbabilities that accused No. 2 could not have handled two weapons i.e. axe and knife at the same time, but the fact remains that accused No.2 had an axe in his hand and by blunt part of the axe, a blow was given to Ramde Samat on his waist by accused No.2. It is the prosecution case that Samat Hamir snatched said axe from accused No.2 and kept with him and on the next day he presented said axe to the Investigating Officer, who by panchnama at Exhibit – 9 seized the same. Appreciating these circumstances of the prosecution case as a whole, we found that when this axe was handed over to the Investigating Officer by Samat Hamir, it contained blood stains. This axe was then sent to the Forensic Science Laboratory and opinion of

Analyst of Forensic Science Laboratory was placed on record by the prosecution. It is found that the axe had blood marks containing human blood `A' ground, which is evident from Exhibit – 31, a report from the Senior Scientific Chemical Examiner of Forensic Science Laboratory, Government of Gujarat at Junagadh. It is also evident from the said report that deceased had blood group of `A'. Meaning thereby that attempt of prosecution is to show that axe recovered from Samat Hamir contained blood group belonged to deceased Narmad. Now these circumstances are evaluated with overall prosecution case, it is revealed that seizure of axe from Samat Hamir, a prosecution witness, is a doubtful circumstance. In complaint filed by Ramde Samat, nowhere it is stated that axe which was with accused No.2 was snatched by prosecution witness Samat Hamir from accused No.2. Even Samat Hamir did not speak about this to the police before next day when his statement was recorded. Axe was kept in the open yard of the house of witnesses. It is significant to note that it is not the prosecution case that any injury was caused to any of the witnesses by axe by accused No.2 by blades of the axe. No such incise wound was found to have been inflicted by an axe on any of the injured persons. On the contrary, the prosecution case is, as has been disclosed from all the four eye witnesses that blunt side of the axe was hit by accused No. 2 on waist of Ramde Samat, and according to Ramde Samat, he had a swelling on

account of this injury on his body i.e. on waist portion. Interesting it is to note that Dr. Vyas who first in point of time examined Ramde Samat, did not note this injury nor Ramde Samat volunteered before the Doctor about this injury and obtained treatment. Reasonable inference would be, there were no other injuries on the body of complainant Ramde Samat, except noted in the medical certificate - Exhibit – 24, and as has been deposed by PW-6 Dr. Dilip Amrutlal Vyas, and accordingly there was no injury on waist portion of Ramde Samat. The prosecution failed to explain that when there was no incise wound by an axe, attributed to any of the accused, how blood containing group of deceased came on blade of the said axe, when prosecution case itself is that blunt part was hit by accused No.2 on waist of Ramde Samat. This fact though itself is in doubt as no medical evidence is corroborating the say of the witnesses in this respect. These unexplained circumstances of recovery of axe from witness Samat Hamir and finding blood on blade side of the axe caste serious doubt upon the veracity of the prosecution case and credibility of the say of the witnesses is shaken to considerable extent. This is so because the fact of recovery of the axe and finding of blood belonged to the group of deceased is not normal and ordinary circumstance as has been disclosed in the prosecution case. This is again a major reason to doubt the prosecution case even though the witnesses may be consistent in their

say about injuries caused to both the persons.

19 According to prosecution case, First Information Report came to be recorded by prosecution witness PW-23 Jagannath Govinda, Head Constable of Porbandar City Police Station at 5.45 a.m. on 6th of February, 1985. According to prosecution case, right after the incident, both the victims were shifted to Bhavsinhji Hospital at Porbandar and were first examined by Dr. Dilip Amrutlal Vyas and he informed to the police station at about 1.30 a.m. When we appreciate the evidence of PW-22 Trikambhai Rambhai, Exhibit – 65 and PW-23 Jagannath Govinda, Exhibit – 67, both police personnel of Porbandar City Police Station, it clearly appears that as soon as PW-22 being PSO received information from the hospital telephonically at 1.50 hours, vide Yadi at Exhibit-66, PW-22 Trikambhai deputed Jagannath Govinda PW-23 to inquire into the matter. Now, according to the evidence of PW-23, Jagannath Govinda though he immediately visited both the injured, but did not record the complaint immediately. It is interesting to note that he deposed that the general condition of Narmad Samat was not good and he was admitted in the emergency ward. He stated that even general condition of Ramde Samat was not good and he was not properly speaking. It is the say of Jagannath Govinda that Ramde Samat gained consciousness at about 5.00 to 6.00

A.M. and therefore the complaint at Exhibit – 68 was recorded by him as offered by Ramde Samat. Complaint was then taken to Porbandar City Police Station and forwarded to Bagavadar Police Station. The question is how far we can rely on witness Jagannath Govinda, examined at Exhibit – 67. Necessary it is again to evaluate and appreciate the evidence of Dr. Vyas examined as PW-6 at Exhibit-41. It is clear that Ramde Samat had four incised wounds on his right hand and size of those wounds are also described by PW-6 Dr. Vyas. Those injuries are not that serious which would deter a patient in speaking or offering a statement or a complaint. In Certificate at Exhibit – 24, nowhere it is mentioned that general condition of Ramde Samat was so serious that he could not have stated anything or could not have properly spoken. Even none of the injuries, out of four, was bleeding. In the opinion of Dr. Vyas, probable healing time of such injury of 8 to 10 days, if no complication arose. The patient was discharged from the hospital on 11th of February, 1985. Now, this fact shows that Ramde was undoubtedly in condition to offer his complaint even earlier, then why the Police Constable Jagannath Govinda stated that he did not record the complaint earlier because Ramde Samat was unconscious or was not properly speaking and the complaint came to be recorded by him only when he gained consciousness at about 4.45 a.m. This is against the medical evidence adduced in prosecution case and these

circumstances clearly suggest that the FIR was offered by Ramde Samat after his father reached at the hospital and after due contemplation. There may be explanation for not recording of the complaint on the part of the police personnel. Probable and possible explanation may inspire confidence, but a negative and improbable facts, as stated by police Head Constable Jagannath Govinda, certainly creates doubts in the prosecution case. Interesting it is to note that it is a positive case of Police Constable Jagannath Govinda that though he had reached early at the hospital, but did not record the complaint because Ramde Samat was not conscious. It is not the case that he reached for some reasons late at the hospital and recorded the complaint. In the circumstances it must be noted that it is not only, the case of no explanation for recording of late FIR, but this is also the case of false explanation for recording the FIR late. This circumstance must be appreciated with one more circumstance and which was recorded in case papers Exhibit – 42 in respect of deceased Narmad by PW-6 Dr. Dilip Amrutlal Vyas. In case papers, it was recorded that patient was conscious and Bhurabhai Nathabhai gave a history that injuries were caused on Narmad on account of assault by somebody. Now it is in the prosecution evidence that Bhurabhai Nathabhai was consulted by Samat Hamir, father of Narmad Samat immediately after the incident. The first version, therefore, before the

Doctor in respect of the incident was of assault by somebody. When these circumstances are evaluated together, it creates doubt in the say of the witnesses and affects the prosecution case very seriously.

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20 Besides above referred serious infirmities in the prosecution case, we also noticed contradictions going to the root of the prosecution case. In criminal trials, motive is never relevant when ocular evidence is found trustworthy, but when ocular evidence is suspicious, motive assumes some significance. When we appreciated the motive of the crime, we found that it was demand of Rs. 50,000/- by the accused from Ramde Samat, led to the incident, in which unfortunately deceased Narmad died and Ramde Samat received injuries. When genesis of the incident is examined through natural course of events and from logic of a prudent person, we found that night at 10'O clock when all alone in distant field, Ramde, Masari and Veja were watering field, it was not expected that any of them might be having amount of Rs. 50,000/-. If it was a robbery, then possibility would be to commit robbery at the house of the complainant where accused might have committed this crime. Theory of prosecution that as soon as accused came, delivered a slap to Ramde Samat and demanded amount, appears to be unnatural when the same is scrutinized with the

above referred circumstances. Therefore, as it appears that, motive of the incident also may be different and those circumstances leading to the incident is kept in dark. Necessary it is to note here that in this respect, PW-9 Masari Narmad, in his cross-examination in para - 8 admitted that accused No.1 alone had been to his field earlier in the day. He stated that he could not say the exact time but on that day Karsan did visit his field in the day time. These circumstances led to doubt as to the origin of the dispute arose between the complainant and the accused. The fact that for the demand of Rs. 50,000/-, serious fight ensued and Ramde was dragged and attempt was to kidnap him, appears not to be extremely truthful and probable.

21 It is an admitted fact that Bagavadar Police Station is 1 ½ kms away from the field of the complainant side. True it is that, when somebody is seriously injured, the first thought would be to shift them into the hospital, but the evidence reveals that the injured were already shifted to the hospital along with some other persons and mother of the deceased, but father Samat Hamir reached to the hospital later on motorcycle. No attempt is made to contact police when the police was available at the distance of 1 ½ kms .

22 Almost all the witnesses were confronted with their police

statements as to the manner of incident. The version which witnesses offered before the Police was that Narmad rushed towards accused to get Ramde released from the accused, and in that process, accused No.1 inflicted spear blow on Narmad. This is proved by the evidence of the Investigating Officer. In the evidence of PW-9 Masari Narmad, it is proved that he did not state before the police that accused inflicted three blows of spear on his uncle Ramde. Even he did not state before the police that accused No.1 fired a round from his revolver. Narmad Samat when he was shifted to the hospital was conscious and PW-23 Jagannath Govinda also wrote a Yadi to the Executive Magistrate for DD, but what happened thereafter is not coming on record. Exhibit – 18 is that Yadi and Narmad died at 2.15 p.m. The case of the prosecution witnesses about dragging Ramde Samat by the accused for considerable distance also appears not probable as neither Ramde Samat received any injury on account of dragging nor his clothes were found markings of dragging, as no such evidence is led.

23 It is categorically stated by Ramde Samat in his deposition that before Veja went to their house for calling his father, etc. accused No.3 inflicted blows of spear on his hand. However, in this respect, if the evidence of Samat Hamir is seen, he has stated that those blows were caused after he reached at the scene of offence and even after a

spear blow was given to Narmad. The evidence of witness Samat Hamir was examined in detail with reference to the scene of offence. Ramde Samat in his cross-examination in para-9 emphatically denied that he received spear injuries after his father came to the scene of offence. Even PW-9 Masari Narmad also categorically stated in his evidence that three blows of spear were inflicted on his uncle only after his grandfather i.e. Samat Hamir, reached at the scene of offence. PW-9 Masari Narmad also further stated that Veja had gone to his house before accused No.2 inflicted an axe blow on his uncle Ramde Samat and thus witness Veja, according to this witness, was not an eye witness of that blow, however, Veja Narmad becomes a witness of the said blow. These contradictions goes to the root of the prosecution story. Samat Hamir admitted in his cross-examination in para-10 that he narrated the incident to Jiva Nathu and Kana Karna and stated that some unknown persons had assaulted Narmad and Ramde. What is elicited in cross-examination cannot be ignored with reference to the testimony of this witness. When it is an established case that accused No.3 was known to the witnesses before the incident, the evidence of TI parade does not assume any importance. It is not understood that how accused No.2 managed two weapons at a time i.e. knife and axe. It is not understood that while running away when the accused were directed towards waste land, accused No.2 would fire a round from

the revolver, that too, in the air.

24 All the circumstances are taken together, it can safely be said that the prosecution case suffers from serious lapses and infirmities going to the root of the prosecution case and when the prosecution story is examined carefully, it clearly appears that the same cannot stand on the anvil of probabilities. It is the duty of the prosecution to prove the case by unimpeachable evidence and what is disclosed by the evidence as discussed above, creates dilemma that where in fact the truth lies. In criminal trials when such dilemma arises and when court finds itself at cross-roads as to where to find out the truth, the rough and ready answer and obvious mandate given by the criminal jurisprudence is to abandon the exercise in futility in search of the truth and better give the benefit of doubt to the accused by way of abundant caution. In this view of the matter, when the prosecution case is shrouded by clouds of doubt, then such doubt must be resolved in the favour of the accused. It is not couple of circumstances, as indicated above, affects the prosecution case, but when all the circumstances are considered together and evaluated in totality, it leaves no room that the prosecution could not prove its case beyond reasonable doubt and, hence, accused are rightly acquitted by the Trial Court, but for the reasons, as mentioned above. This Appeal therefore filed by the State

against the order of acquittal, in our humble view, has no merit and the following order is passed.

"The Appeal stands dismissed. Bailable warrant issued against each of the respondents stands cancelled."

(J. R. VORA, J.)

(BANKIM.N.MEHTA, J.)

pnnair